Supreme Court, U.S.
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No. 96-53

In the Supreme Court of the United States

OCTOBER TERM, 1995

BILLY F. PRICE, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WALTER DELLINGER
Acting Solicitor General
FRANK W. HUNGER
Assistant Attorney General
WILLIAM KANTER
HOWARD S. SCHER
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 514-2217

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly determined that petitioners' Federal Tort Claims Act (FTCA) claim for damages alleging wrongful conversion of four watercolors painted by Adolph Hitler was precluded by the FTCA's foreign country exception, 28 U.S.C. 2680(k), because the watercolors were confiscated by the United States in Germany at the end of World War II.

2. Whether the court of appeals correctly determined that petitioners' FTCA claim challenging the United States' vesting ownership of certain photographic archives in the United States at the end of World War II under the Trading With the Enemy Act, 50 App. U.S.C. 1 *et seq.*, was precluded by 28 U.S.C. 2680(e), which specifically precludes using the FTCA to challenge actions taken under the Trading With the Enemy Act.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 4a-25a) is reported at 69 F.3d 46. The opinion of the court of appeals on rehearing (Pet. App. 1a-3a) is reported at 81 F.3d 520. The district court opinion on partial summary judgment (Pet. App. 26a-39a) is reported at 707 F. Supp. 1466. The district court's findings of fact on damages (Pet. App. 40a-43a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 20, 1995. A petition for rehearing was granted in part and denied in part and the judgment was modified on April 10, 1996. Pet. App. 1a-3a. The petition for a writ of certiorari was filed on July 9,

1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Federal Tort Claims Act, 28 U.S.C. 2674, 2680(e) and (k), and the Trading With the Enemy Act, 50 App. U.S.C. 7(c), 9(a), 33, are *reprinted at* Pet. App. 44a-53a.

STATEMENT

1. a. Petitioners, an American businessman and the heirs of Adolph Hitler's personal photographer, Heinrich Hoffmann, Sr., claim to be the owners of four watercolors painted by Hitler and transferred to Hoffmann, and two photographic archives compiled by Hoffmann and his son. The U.S. Army discovered the paintings and one of the photographic archives (the Washington archive) in Germany during the final days of World War II. The other photographic archive was obtained by Time-Life, Inc., at the end of the war and given by it to the United States in the early 1980s (the Carlisle archive).

b. The four Hitler watercolors were obtained by Heinrich Hoffmann, Sr. in 1936 by purchase and gift from Hitler. Pet. App. 6a, 27a. At the end of World War II, the United States and other Allied countries undertook a program to "denazify" Germany. Pursuant to international agreements, the Yalta Conference, 3 Charles Bevans, *Treaties and Other International Agreements of the United States of America, 1776-1949*, at 1005 (Gov't C.A. Br. App. 35a), and the Potsdam Conference, 3 Bevans, *supra*, at 1207 (Gov't C.A. Br. App. 43a), an American Military Government Directive called for the seizure of all art relating or dedicated to the perpetuation of the Nazi movement or German militarism. See *Military*

Government Regulations, United States 18-401.6 (1947). Gov't C.A. Br. App. 25a. Assignment of an American military officer to administer this task resulted in the eventual collection of some 8,000 pieces of art, which were sent to the United States in March, 1947 (Record on Appeal 23-22 ¶ c). Approximately 6,337 paintings are still in the hands of the Department of the Army, including the four watercolors at issue here (*ibid.*).

Petitioners also claim to be the owners of two photographic archives in the possession of the United States. The first archive, the Washington archive, was discovered by the United States Army in a castle in Bavaria at the end of World War II. Pet. App. 7a. That archive was used at the Nuremburg trials and, by 1951, transferred to the United States. *Id.* at 28a-29a. In 1951, the United States Office of Alien Property vested ownership of the Washington Archive in the Attorney General. See Vesting Order No. 17,952, 16 Fed. Reg. 6162 (1951) (Gov't C.A. Br. App. 32a). The Washington archive is now stored at the National Archives. Pet. App. 7a.

The second archive, the Carlisle archive, was, according to petitioners, taken from Germany by Time magazine correspondents in the 1940s. Pet. App. 7a. In the early 1980s, Time delivered some of the photographs to the United States Army in Carlisle, Pennsylvania. *Ibid.*

In 1982 and 1983, petitioner Price claimed to have gained an interest in the watercolors and the photographic archives by paying a small sum to Heinrich Hoffmann, Sr.'s heirs, who were citizens and residents of Germany, in exchange for their rights in the watercolors and archives. Pet. 6. Price promised to seek return of the items and to give Hoffmann, Sr.'s

heirs a portion of whatever he recovered. Price then made several demands on the National Archives and the Army to return the watercolors and the photographic archives. Those demands were rejected. Pet. App. 7a.

2. In 1983, petitioners filed suit under the Federal Tort Claims Act to recover damages for the alleged loss of the watercolors and photographic archives. The government filed a motion to dismiss and petitioners filed a motion for partial summary judgment. In February, 1989, the district court granted petitioners' motion for partial summary judgment. Pet. App. 26a. The district court determined that the United States became a bailee when it took possession of the watercolors and the Washington archive in Germany, and that the bailment continued until it was breached in the United States in the early 1980s when the United States refused Price's request to return the art work. *Id.* at. 7a-8a, 31a-33a. The court determined, accordingly, that petitioners' cause of action for the tort of conversion did not accrue until the government refused to return the watercolors and archives in the United States in the early 1980s. *Id.* at 31a-33a. The court also concluded that petitioners' cause of action for the Carlisle archive accrued in the 1980s, when the United States received that archive from Time. *Id.* at 33a. The court rejected the government's arguments in its motion to dismiss, ruling: (1) that claims by or on behalf of German citizens and residents were not precluded by the Convention on the Settlement of Matters Arising Out of the War and the Occupation, October 23, 1954, U.S.-Germany, 6 U.S.T. 4411, T.I.A.S. No. 3425 (1954 Settlement Convention) (Pet. App. 31a); (2) that the foreign country exception to the FTCA, 28 U.S.C.

2680(k), did not preclude this action (Pet. App. 34a-35a); and (3) that the two-year statute of limitations for tort claims against the United States, 28 U.S.C. 2401(b), did not bar this action (Pet. App. 36a-38a).

c. In March, 1989, the district court held a trial on damages. Before the trial, the government filed its answer (which was timely filed in light of the procedural background of the case) and a renewed motion to dismiss, raising—in addition to the 1954 Settlement Convention, the FTCA's foreign country exception, and the statute of limitations (all of which had been raised in the government's previous motion to dismiss)—the Anti-Assignment Act (31 U.S.C. 3727) and the FTCA's "due care" and "discretionary function" exceptions (28 U.S.C. 2680(a)), misrepresentation exception (28 U.S.C. 2680(h)), and exhaustion requirement (28 U.S.C. 2675(a)). The district court denied the government's renewed motion to dismiss without opinion (Gov't R.E. 37 ¶ 1) and awarded damages totalling $7,949,907.69. Pet. App. 40a-43a.

3. a. The court of appeals reversed the judgment against the government and ordered a portion of the case dismissed with prejudice. The court held that the claim for the Hitler watercolors was barred by the FTCA's foreign country exception, 28 U.S.C. 2680(k). As to the Washington archive, the court held that Vesting Order No. 17,952 vested ownership in the Attorney General in 1951 under the Trading With the Enemy Act, and that petitioners' exclusive remedy for recovery of that archive lay under that Act because the FTCA, 28 U.S.C. 2680(e), precludes use of the FTCA to challenge conduct undertaken pursuant to the Trading With the Enemy Act. Pet. App. 16a-17a. Because the time for filing a claim under the

Trading With the Enemy Act had long since expired, that claim had to be dismissed. *Id.* at 17a-18a.

The court held that petitioners' claim for the Carlisle archive (the 1983 value of which was estimated by the district court at about $9,000) had to be dismissed without prejudice for failure to exhaust his administrative remedies, as required by the FTCA. That claim is the subject of a separate lawsuit pending in the district court. Pet. App. 19a-21a.

b. Petitioners sought rehearing and rehearing in banc. The court granted panel rehearing in part as to the Washington archive. Petitioners argued in pertinent part that the court's original decision should be modified since the Vesting Order referred to the vesting of only a portion of the glass negatives, whereas the district court had awarded damages for all the negatives. Pet. App. 2a-3a, 41a-42a. The court of appeals ordered dismissal of petitioners' claim to the allegedly missing portion of the glass negatives on the ground that petitioners had failed to comply with the administrative exhaustion requirements of the FTCA. *Id.* at 1a-3a. The dismissal is without prejudice to the separate lawsuit pending in the district court. *Id.* at 3a. The petition for rehearing in banc was denied. *Id.* at 3a n.1.

Only the watercolors and that portion of the Washington archive subject to the Vesting Order are at issue in this petition. Pet. 9.

ARGUMENT

1. Petitioners argue (Pet. 12-18) that the court of appeals erred in concluding that petitioners' FTCA claim regarding the Washington archive was precluded by 28 U.S.C. 2680(e), which provides that the

FTCA cannot be used to challenge actions taken pursuant to the Trading with the Enemy Act.

Section 2680(e) of the FTCA provides that the FTCA does not apply to claims "arising out of an act or omission of any employee of the Government in administering the provisions of [the Trading With the Enemy Act]." Pet. App. 16a-17a. The Washington archive vested in the United States government pursuant to Vesting Order No. 17,952, 16 Fed. Reg. 6162 (1951). That order was issued pursuant to the Trading With the Enemy Act, see 16 Fed. Reg. at 6162, and thus was issued in the course of administering that Act.

Petitioners argue (Pet. 13-14) that the exception in Section 2680(e) does not apply because the Vesting Order was void *ab initio*. As the court of appeals correctly concluded, however, any challenge to the validity of the Vesting Order must be brought under the Trading With the Enemy Act, which provides its own mechanism for challenging acts or omissions taken under the authority of that Act. See 50 App. U.S.C. 33.[1]

Petitioners rely on *Miller* v. *Standard Nut Margarine Co.*, 284 U.S. 498 (1932), and *Enochs* v. *Williams Packing & Navigation Co.*, 370 U.S. 1 (1962), in which the Court held that the provision of the

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[1] As the court of appeals correctly noted, the time for pursuing relief under the Trading With the Enemy Act expired no later than June 25, 1953. Pet. App. 17a-18a. Petitioners did not attempt to bring an action under the Trading With the Enemy Act. Pet. 2. Moreover, since the Vesting Order was published in the *Federal Register*, 16 Fed. Reg. 6162 (1951), their claim (Pet. 17) that the Act is unconstitutional as applied to them because they "had no way of knowing about the vesting order" is mistaken.

Internal Revenue Code barring suits for injunctive relief does not bar suits against federal officials to enjoin the collection of taxes when it is "apparent * * * under the most liberal view of the law and the facts [that] the United States cannot establish its claim." *Enochs*, 370 U.S. at 7-8. *Enochs* and *Miller* do not address the issue of sovereign immunity but only the statutory question of whether certain suits are barred by the relevant provision of the Internal Revenue Code (now 26 U.S.C. 7421(a)). In addition, those cases involve suits against federal officials for equitable relief, not, as here, suits against the United States for, *inter alia*, monetary relief. See, *e.g.*, *Dugan* v. *Rank*, 372 U.S. 609, 621-622 (1963) (noting that when federal officers act beyond their statutory powers, an exception to the rule of sovereign immunity allows "a suit for specific relief against the officer as an individual").

2. Petitioners contend (Pet. 18-29) that the court of appeals erred in determining that the four Hitler watercolors were confiscated in Germany at the end of the war and that, as a result, the FTCA's foreign country exception, 28 U.S.C. 2680(k), precluded petitioners from maintaining their action for damages for the alleged wrongful conversion of the four watercolors. Petitioners argue that (1) the court improperly found facts on appeal (Pet. 19-23) and (2) its findings of fact were contradicted by the record (Pet. 23-29).

The court of appeals did not engage in improper factfinding on appeal. The court of appeals' conclusion that the Hitler watercolors were confiscated in Germany at the end of the war was correctly based on the evidence presented by petitioners in the district court in support of their motion for partial summary

judgment. In the district court, petitioners submitted the "property cards" (see Pet. App. 12a-14a) for six paintings, including the four Hitler watercolors, that listed "Hoffmann" as the owner of the paintings. "Property cards" were used by the U.S. Army as part of its post-war program to return lost or looted artwork to the rightful owner. *Ibid.*; see generally, *e.g.*, *DeWeerth* v. *Baldinger*, 836 F.2d 103, 111 (2d Cir. 1987), cert. denied, 486 U.S. 1056 (1988); *Kunstsammlungen Zu Weimar* v. *Elicofon*, 536 F. Supp. 829, 851-852 (E.D.N.Y. 1981), aff'd, 678 F.2d 1150 (2d Cir. 1982). The court of appeals correctly noted that, although the six "property cards" submitted by petitioners identified "Hoffmann" as the owner, only two of the paintings were returned to Hoffmann, Jr. on June 23, 1949. The four Hitler watercolors were not returned at that time. Pet. App. 13a-14a. In view of the different handling of those paintings, the court of appeals concluded that the United States confiscated the Hitler watercolors in Germany in 1946 or 1947. See *ibid.*

Petitioners argue (Pet. 19-29) that the court of appeals improperly relied on Ms. Bohm's statement in her deposition testimony that American authorities "confiscated" the Hitler watercolors. Pet. App. 12a-13a. As stated above, the court of appeals did not rely solely on the Bohm deposition but also on the Army's handling of the Hitler watercolors as compared to its handling of the other two paintings. See *id.* at 13a-14a, 15a. Nor can petitioners now complain about the English translation of the Bohm deposition. Petitioners took the deposition and were responsible for the translation submitted to the court. It is too late to try to revise the translation, especially since petitioners waited until after the government and the

court of appeals relied on the translation to petitioners' detriment.[2]

b. Petitioners argue (Pet. 29) that the foreign country exception should not apply because "[t]he sole aim of the foreign country exception to [the] FTCA is to preclude the United States from being confronted in litigation with provisions of foreign law over which it has no control." Petitioners contend (*ibid.*) that "*no* foreign law is involved in this case." Contrary to that contention, German law is, in fact, integrally involved. The Hoffmanns had to prove under German law that they were the lawful owners of the watercolors and the archives. To that end, they produced the "Erbschein" (will) and asserted that it established Henriette von Schirach as the sole heir of Hoffmann, Sr. See Pltf. R.E. 14A-14F. Then, they had to prove that German "denazification" proceedings vis-a-vis Hoffmann, Sr. (see Pet. 5 & n.2; Pet. App. 27a-28a) had not taken this property from him—which would have meant that it was not Hoffmann, Sr.'s property to bequeath. See, *e.g.*, Record on Appeal 492-491 ¶ 22. With respect to the Washington archive, petitioners had to establish that, under German law, Hoffmann, Sr. made a gift of both the archives *and* the copyrights to Hoffmann, Jr. See Pltf. R.E. 102A, 107-108. Finally, petitioners could maintain this action only because German law has a

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[2] Petitioners contend (Pet. 20-21) that the better or correct translations of the German words "*beschlagnahme*" and "*sichergestellt*" are, respectively, "took control of" and "taken into custody." When read in connection with the Army's decision to ship the Hitler watercolors to the United States and to return the other two paintings to Hoffmann, however, the phrases "taken into custody" or "took control of" have the same legal significance as "confiscated."

concept of "deposit" (see Pltf. C.A. Br. 27) apparently similar to "bailment" in the United States.

3. Finally, the court of appeals' judgment is supported by two additional, independent grounds, both of which were raised by the government below.

a. First, Article 3 ¶ 2 of the 1954 Settlement Convention between Germany and the United States required dismissal of petitioners' claim in toto. Gov't C.A. Br. App. 21a-22a. Under Chapter 9, Article 3 ¶ 2 of that Convention, Germany waived the claims of German nationals against the United States for "*claims of any kind* arising out of acts or omissions * * * which took place in respect of Germany, German nationals or German property, or in Germany, between 5 June 1945 and the entry into force of the present Convention [October 23, 1954]" (emphasis added). That language, which covers acts and omissions "in respect of * * * German nationals" as well as acts or omissions "in Germany," disposes of petitioners' claims with respect to both the watercolors and the Washington archive.

b. Second, the Anti-Assignment Act, 31 U.S.C. 3727, bars this action. As the district court stated, petitioner von Schirach "agreed to convey ownership of the works [Hitler's paintings] to Price in exchange for his securing them from the possession of the United States." Pet. App. 28a. "The Hoffmanns' ownership in the [photographic] archive was also conveyed to Price." *Id.* at 29a. Thus, petitioner Price purported to obtain assignments of the claims that are the subject matter of this litigation.

Such assignments are barred by the Anti-Assignment Act. That Act applies to any "transfer or assignment of any part of a claim against the United States Government or of an interest in the claim." 31

U.S.C. 3727(a)(1). The Act provides that "[a]n assignment may be made only after a claim is allowed, the amount of the claim is decided, and a warrant for payment of the claim has been issued." 31 U.S.C. 3727(b). In short, only the equivalent of a judgment may be assigned, not, as here, the possibility of a judgment. See *United States* v. *Shannon*, 342 U.S. 288, 291 (1952). Once petitioner Price is removed as a party because of the Anti-Assignment Act, the case must be dismissed for lack of venue, because the other petitioners, assuming *arguendo* they were proper parties, do not reside within the district where suit was brought, nor did the act or omission complained of occur there. See 28 U.S.C. 1402(a) and (b).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

WALTER DELLINGER
Acting Solicitor General

FRANK W. HUNGER
Assistant Attorney General

WILLIAM KANTER
HOWARD S. SCHER
Attorneys

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